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The Tort Liability of Florida Municipal Corporations

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amounts that have been previously deducted as depreciation.[77]

Underlying the apparent inconsistency between the theory of section 1231 as originally enacted, and the effect of section 1245, are the conflicting policies of providing substantially equal tax treatment to all taxpayers similarly situated, and fostering the maximum investment in modern equipment and facilities. Unless Congress wants to adopt a completely different concept of depreciation, based upon price level rather than historical cost,[78] a concentration on the enforcement of depreciation deductions in order to prevent abuses under section 1231, rather than a virtual elimination of its beneficial incentive effects, would be a more equitable method of resolving this conflict.

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THE TORT LIABILITY OF FLORIDA MUNICIPAL CORPORATIONS

When the rule of municipal immunity from tort liability was evolving, municipal activities were confined almost exclusively to the essential requirements of government, such as police protection and fire fighting. Since the turn of the century, however, municipal activities have gradually encompassed broader functions, some of which were formerly considered basically the province of private enterprise. This expansion of function, coupled with the increase in the number of municipal employees and the greater risks accompanying the complexities of the Machine Age, means that an ever-increasing number of persons will suffer injuries from governmental operations. The question of where to place responsibility for these injuries raises serious problems.

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77. See *Hearings on H.R. 10650 Before the Senate Committee on Finance*, 87th Cong., 2d Sess. 742 (1962).

78. See Paton, *Depreciation—Concept and Measurement*, 108 J. Accountancy, Oct. 1959, p. 38; Gilmour, *Need for Price Level Depreciation Poses a Challenge to Accounting*, 40 Nat'l Ass'n of Accountants Bull., July 1959, p. 29.

The doctrine of municipal immunity from tort liability was developed by the judiciary as protection for the municipality against the possibility of an unbearable financial burden. At the time of this development, the courts were also applying doctrinal immunities to private corporations, thus transferring the risks and dangers of the corporate activities to the victims of business enterprise rather than letting them fall upon the enterprise itself.[1] The immunities protecting private corporations began to weaken in the early 1900's, and many of these immunities are no longer in effect. By contrast, the corresponding weakening of the immunity protecting municipal corporations has not been effected to the same extent, despite almost universal protest by commentators, and criticism by many judges.[2]

Although municipal immunity has been generally upheld, there are contradictory elements in the application of this doctrine by the courts. Notwithstanding the courts' insistence that they are obligated to apply the rule of immunity of municipalities, there has been judicial restriction of the doctrine.[3]

The most substantial restriction upon the doctrine has been the modern rule that municipal corporations are liable for torts resulting from acts performed in the proprietary capacity of the municipality. This has increased the liability of municipal corporations as the concept of proprietary acts has been steadily expanded. However, the maze of contrariety marking the judicial effort to classify particular functions as governmental or proprietary demonstrates the lack of any sound foundation for this distinction.[4] There are irreconcilable inconsistencies in the judicial classification of most newer and some older municipal functions; even within any one jurisdiction, a consistent pattern cannot be gleaned from the cases. "The conflict and confusion . . . [may be attributed] to the judicial compromise between the unfairness of complete immunity and the dread of complete liability."[5] Even if the line of demarcation between governmental and proprietary functions could be established satisfactorily now, problems would continue to arise because the functions of municipal government are being continually extended. Moreover, what is today a public obligation and a governmental function might not so clearly be one tomorrow. The proprietary-governmental distinction has been employed by the courts as a vehicle for escaping the full force of immunity from tort liability.

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1. Green, *Freedom of Litigation*, 38 ILL. L. REV. 355, 359 (1944).

2. *Ibid.*

3. Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 219, 359 P.2d 457, 461 (1961).

4. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 13 (1924).

5. Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 LAW & CONTEMP. PROB. 214, 216 (1942).

SHRINKING SCOPE OF MUNICIPAL IMMUNITY FROM TORT LIABILITY

Both the legal commentators and the judiciary have critically examined the rationale underlying municipal immunity. One common explanation is based on the theory that a municipal corporation acting in its governmental capacity is acting as an arm of the state. The state is not subject to suit in tort, and its appendage possesses a like immunity.[6] However, a state enjoys its immunity because of the lack of a remedy against it. It must be recognized that courts generally have adequate jurisdiction over municipal corporations. Therefore, when both the wrong and jurisdiction over the wrongdoer exist, immunity cannot be justified by this analogy. Moreover, the basic premise that a municipality is an anatomical part of the state is open to question. A municipality is an independent governmental unit and functions as such, subject to the limitations in its charter from the state.[7]

Another justification for the doctrine of municipal freedom from liability is that the primary duty of the municipality is owed to the public. Therefore, even though negligence may cause damage to an individual, the benefit of the discharge of a public function is deemed an outweighing consideration justifying immunity. Such immunity is necessary to enable a municipal corporation to perform properly all its functions and assume new ones.[8] Clearly, "the Administration cannot be held to the obligation of guaranteeing the citizen against all errors or defects, for life in an organized community requires a certain number of sacrifices and even risks."[9] Several arguments can be offered in rebuttal to the theory that it is better that the individual suffer a wrong than to imposed liability on the government.

First, corporate power coupled with responsibility may cause a greater conscientiousness by those in charge of the operations.[10]

Second, a basic concept in the law of torts is that liability follows negligence. Individuals and corporations are responsible for injuries caused by the negligence of their agents and employees acting in the course of employment. Government immunity is directly counter to this concept.[11] The paramount consideration should be the injury to the person and not the character of the person who causes it.

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6. *Id.* at 219.
7. City of Miami v. Bethel, 65 So. 2d 34, 36 (Fla. 1953) (concurring opinion).
8. Repko, *supra* note 5, at 219.
9. Borchard, *supra* note 4, at 1.
10. See City of Miami v. Bethel, 65 So. 2d 34, 38 (Fla. 1953) (concurring opinion).
11. Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 20, 163 N.E.2d 89, 93 (1959), *cert. denied*, 362 U.S. 968 (1960).

Third, municipal immunity has been considered an invasion of the rights of the individual. The Florida court has stated that,[12]

> If there is anything more than a sham to our constitutional guarantee that the courts shall always be open to redress wrongs[13] and to our sense of justice that there shall be a remedy for every wrong committed, then certainly this basis for the rule cannot be supported.

The courts are bound to protect the rights of citizens against invasion, whether perpetrated by an individual or a government.

Perhaps most important of all is a current social trend in the United States from individualism toward collective responsibility, including an assumption by the body politic of much of the loss created by all manner of individual misfortunes.[14] For example, the normal costs of business today include such things as workmen's compensation and pension funds.[15]

One of the primary considerations underlying the doctrine of municipal immunity is fear of the tremendous financial burden that liability would cast upon the taxpayer. Experience of private enterprise, and of those municipal corporations that have adopted a rule of liability, has indicated, however, that this argument has little practical basis. Tort liability takes up a very small proportion of the operating costs of any well-organized enterprise.[16]

Moreover, although public liability insurance is common in private enterprise, it has been treated by the courts as if it were a barely tried invention. Schemes for prepaying and sharing risks were relatively rare when American courts adopted the doctrine of governmental immunity. In 1963, however, liability insurance is no new device; it would merely occasion a minor tax increase.[17]

Another consideration advanced in support of the doctrine of immunity is that negligent municipal employees are not protected by the immunity of the municipality and are thus personally liable to the injured party. This argument lacks effectiveness for three main reasons. First, this may be inadequate protection for private citizens injured by

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12. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957).

13. FLA. CONST. Decl. of Rights, §4: "All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay."

14. Stason, *Governmental Tort Liability Symposium*, 29 N.Y.U.L. REV. 1321 (1954).

15. See Repko, *supra* note 5, at 217.

16. Green, *Freedom of Litigation*, 38 ILL. L. REV. 355, 379 (1944).

17. Williams v. City of Detroit, 364 Mich. 231, 259-60, 111 N.W.2d 1, 25 (1961) (concurring opinion).

the municipal agents because of the uncollectibility of judgments against most city employees. Second, such liability on the part of the employee alone means that the risks of accepting public employment fall upon the subordinate with unjust severity and, ultimately, with detriment to the public. The risk of such liability, coupled with low pay, may result in failure of the subordinate to properly perform his duty.[18] Third, if the employee is judgment proof, the imposition of liability on the municipality will not affect his incentives to avoid tortious conduct while performing his job. For a financially stable employee, the incentive still remains because his liability is not removed, the imposition of municipal liability merely making an additional party liable. It must be recognized, of course, that proper administrative supervision of employees is a better inducement to careful and diligent public service than is the fear of liability.[19]

Many commentators and judges feel that relief from the present state of confusion in the tort law of municipal corporations must come from the legislature. This disavowal of the judicial power to remove the existing governmental immunity has generally been based on two arguments: First, statutory enactments affecting municipal immunity demonstrate that the legislature has determined that the change is not to be made by the court, and second, the rule has become so firmly entrenched by force of stare decisis that only the legislature can change it.[20] The reasoning is that the legislature, through its committees, hearings, and other processes, can best investigate the considerations relating to the removal of municipal immunity. The imposition of municipal tort liability must be accompanied by provisions for paying claims, authorization of a tax levy, and its expenditure. The courts are neither equipped nor authorized to undertake such a task.[21]

On the other hand, particularly in the absence of such legislation, the courts must be free to correct their own errors and to establish new rules when the circumstances of modern life have rendered the old rules unworkable and inequitable.

The Hargrove Decision—the Death Knell of Municipal Tort Immunity?

In 1953, Justice Terrell declared in his dissenting opinion in *City of Miami v. Bethel*[22] that the question of abolishing or modifying munici-

18. Borchard, *Government Liability in Tort*, 34 Yale L.J. 1, 8 (1924).

19. Fuller & Casner, *Municipal Tort Liability in Operation*, 54 Harv. L. Rev. 437, 450 (1941).

20. Muskopf v. Corning Hosp. Dist., 55 Cal. 211, 218, 359 P.2d 457, 461 (1961).

21. Molitor v. Kaneland Community Unit Dist. No. 302, *supra* note 11 at 40, 163 N.E.2d at 103.

22. 65 So. 2d 34, 39 (Fla. 1953) (dissenting opinion).

pal immunity from tort liability should be handled by the Florida judiciary rather than the legislature. Four years later the Supreme Court of Florida adopted this attitude in *Hargrove v. Town of Cocoa Beach.*[23] Recognizing the confusion that resulted from the attempts by the judiciary to "prune and pare" the rule of immunity rather than to bodily uproot this outmoded concept,[24] the court held there was no basis for insistence on legislative action in a matter that the courts themselves had originated. The *Hargrove* decision is the culmination of the Florida judiciary's struggle with the question of municipal tort immunity. In this case the court joined forces with the commentators and assumed a new official posture with regard to the tort liability of municipalities.

The plaintiff in the *Hargrove* case sued the town of Cocoa Beach for the wrongful death of her husband. The decedent had been placed in the municipal jail while intoxicated. His cell filled with smoke during the night, and he was suffocated. Plaintiff sought damages, alleging negligence in leaving the jail unattended and the prisoner unprotected against the fire. The trial court dismissed the complaint, ruling that the municipality was immune from liability for this tort. The Supreme Court reversed, ruling that,[25]

> We . . . now recede from our prior decisions which hold that a municipal corporation is immune from liability for the torts of police officers. Affirmatively we hold that a municipal corporation may be held liable for the torts of police officers under the doctrine of respondeat superior. We think it advisable to protect our conclusion against any interpretation that would impose liability on the municipality in the exercise of legislative or judicial, or quasi-legislative or quasi-judicial, functions. . . .

Declaring that the rule of municipal immunity is anachronistic to our concepts of democratic government, the court pointed out that the modern city is in effect a large business institution.[26]

The court indicated an intent to establish a broad rule of municipal liability, stating that the issue was whether "a municipal corporation should continue to enjoy immunity from liability for the wrongful acts

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23. 96 So. 2d 130 (Fla. 1957).

24. *Id.* at 132. The supreme court illustrated one such anomaly by remarking that if a policeman negligently injures a person while driving a car, the municipal corporation is liable, City of Avon Park v. Giddens, 158 Fla. 130, 27 So. 2d 825 (1946), but if the same officer gets out of the car and wrongfully assaults the person, the municipality is immune from liability. City of Miami v. Bethel, 63 So. 2d 34 (Fla. 1953).

25. 96 So. 2d at 133.

26. *Ibid.*

of police officers."[27] The court announced that "the time has arrived to face this matter squarely in the interest of justice and place the responsibility for wrongs where it should be."[28] However, elsewhere in the opinion the court seemed to limit the rule it was setting out, saying that,[29]

> Subject to the limitations above announced, we here merely hold that when an individual suffers a direct, personal injury proximately caused by the negligence of a municipal employee while acting within the scope of his employment, the injured individual is entitled to redress for the wrongs done.

It is obvious that *Hargrove* is valid precedent only for a case involving a negligent tort. However, the rationale of the decision and the policy considerations underlying it would seem equally applicable to intentional torts. Thus, it is difficult to ascertain precisely the extent to which the Florida court intended to establish municipal liability—whether the municipality is liable for all the wrongful acts of municipal employees or only for negligent acts.

District Court of Appeal Reaction to the Hargrove Decision

The lower courts in Florida have generally refused to extend liability beyond the strict holding of the original decision, and at times have even proved reluctant to give full force and effect to it.

One example of this refusal is the rejection by several lower courts of the contention that liability should be extended to hold municipal corporations accountable for the intentional torts of their employees. On the other hand, it should be recognized that liability has never been denied solely on the basis that the tort involved was intentional. However, the historical classifications of negligent and intentional torts may not be the actual basis of modern court rulings. It is difficult to determine which category the court is using and the reasoning behind its choice.

In *Middleton v. City of Fort Walton Beach*,[30] the plaintiff alleged that he had been arrested by a policeman pursuant to a warrant known by the officer to be void, and that the clerk of the municipal court had acted falsely and maliciously in executing the jurat to the affidavit and issuing the arrest warrant. Plaintiff contended that the *Hargrove* rationale compels the extension of the doctrine of *respondeat superior* to intentional torts of municipal employees. The court declared that "incalculable mischief to the public welfare would unquestionably follow

27. *Id.* at 131.
28. *Id.* at 133.
29. *Ibid.*
30. 113 So. 2d 431 (1st D.C.A. Fla. 1959).

if the doctrine contended for were established."[31] However, the court evaded this problem by characterizing the acts involved as quasi-judicial, and thus falling within an exception of *Hargrove*. In a 1961 case[32] the First District Court of Appeal expressly stated by way of dicta that the *Hargrove* decision should not be extended to include intentional torts of municipal employees. Such statements are contradictory to *Ragans v. City of Jacksonville*[33] in which the court stated that, in view of the *Hargrove* case, municipal tort liability could not be validly restricted to suits arising out of negligence.[34] The action in the *Ragans* case was brought against the city for injuries sustained by plaintiff as a result of an alleged assault during arrest by a city police officer. The Jacksonville charter[35] contained a provision restricting tort suits against the city solely to cases in which the damages are attributable to gross negligence. The court declared that if the provision were valid it would preclude suits to recover damages flowing from an intentional tort committed by a city employee while acting within the scope of his employment. The question of municipal liability for intentional torts is further confused by the two escape valves used by the courts to avoid dealing directly with it.

In the first place, the court can ignore the question and refuse to apply any legal tag at all to the tort; this is apparently what was done in *City of Miami v. Albro*.[36] Plaintiff brought an action for wrongful and malicious arrest and for unlawful imprisonment. While protesting what he considered an unlawful arrest, the plaintiff was pushed toward the rear door of the police vehicle. In the process his arm was broken by a police officer who was holding the plaintiff in such a way that his right arm was bent behind his back. Commenting that the use of excessive force in making an arrest without a warrant could not come within the rule of immunity set forth in the *Middleton* case, the court ruled,[37] without expressly designating the tort as intentional or negligent, that a municipality may be liable for torts such as that alleged in the complaint. Since the tort involved in this case is similar to the one committed in *Ragans*, the inference of this decision corresponds to the inference in the *Ragans* case, that the *Hargrove* principle is not limited solely to negligent torts.

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31. *Id.* at 432.
32. Thompson v. City of Jacksonville, 130 So. 2d 105, 107 (1st D.C.A. Fla. 1961), (dictum), *cert. denied*, and 147 So. 2d 530 (Fla. 1962).
33. 106 So. 2d 860 (1st D.C.A. Fla. 1958).
34. *Id.* at 862.
35. Fla. Laws 1919, ch. 8279, as amended, Fla. Laws Ex. Sess. 1925, ch. 11564.
36. 120 So. 2d 23 (3d D.C.A. Fla. 1960).
37. *Id.* at 26.

In the second place, the court can avoid the question by basing its holding on the principle in *Brown v. Town of Eustis*:[38]

> [A] municipal corporation is not liable for the tortious acts committed by its officers as such, unless the acts complained of were committed in the exercise of some corporate power, or in the performance of some duty imposed upon the municipality by law, and that it is not liable for the unlawful or prohibited acts of its officers or agents.

This formula is founded upon an extremely shadowy distinction, and an intentional tort of the municipal employee can always be classified as simply an unlawful act by the employee. Thus, the false and malicious arrest by the police officer in the *Middleton* case was deemed by the court to be a quasi-judicial corporate function of a municipal employee, whereas in *Brown* the malicious arrest without cause by the policeman was held to be an unlawful and prohibited act. The act of arrest was in effect declared by one court to be a lawful municipal function, and by a second court to be an unlawful operation. Both decisions effectively immunized the municipality from liability for these torts of the police officers. The court concluded in *City of Coral Gables v. Giblin*[39] that the *Hargrove* decision did not overrule or modify the *Brown* principle that liability of the municipal corporation stems from the negligent performance of a lawfully delegated duty rather than from the commission of an unlawful, illegal, or prohibited act.

In summary, it seems that not only have the Florida courts generally refused to advance beyond the immediate holding of *Hargrove*, but they have tended to construe the decision strictly. The Florida Supreme Court expressly excluded any imposition of liability on the municipality in the exercise of legislative or judicial and quasi-legislative or quasi-judicial functions as illustrated in such cases as *Elrod v. City of Daytona Beach*[40] and *Akin v. City of Miami*.[41]

The question raised in *Elrod* was whether the city is liable to a plaintiff for injuries suffered because of the enforcement of an unconstitutional ordinance. The court held that the city was acting in its governmental capacity and no liability attaches to it for either nonuse or misuse of power; the immunity from liability is not dependent upon the use of the best means in the operation of the municipality's governmental business.

In the *Akin* case, a building owner brought an action against the city for damages resulting from its refusal to grant a building permit. The

38. 92 Fla. 931, 933, 110 So. 873 (1926).
39. 127 So. 2d 914 (3d D.C.A. Fla. 1961).
40. 132 Fla. 24, 180 So. 378 (1938).
41. 65 So. 2d 54 (Fla. 1953).

court declared that the exercise of the power to grant or to refuse a building permit is a purely governmental function; a municipality may not be held liable in an action for damages if in the pursuance of its lawful police power it acts in an unlawful or unauthorized manner.

Such a broad statement of this limitation of the rule of *Hargrove* has been criticized on the ground that the Florida court will apparently deny liability for quasi-judicial and quasi-legislative activities, without making a distinction between arbitrary and reasonable conduct.[42] Arguably, the failure to make such a distinction is more consistent with the objectives of municipal immunity. Thus, the exceptions to the *Hargrove* rule provide a vehicle by which courts can avoid municipal liability. The court in the *Middleton* case cited *Akin* as authority for the court's quasi-judicial characterization. Ignoring the factual differences between *Akin* and *Middleton,* the court with no explanation ruled that the acts were quasi-judicial in character. The *Middleton* case involved intentional acts of a police officer and a court clerk which resulted in direct, personal injury, as opposed to *Akin* which concerned the act of an official in the proper exercise of his discretion and within his jurisdiction as a quasi-judicial officer.

In recent Florida cases the *Hargrove* decision has been restricted even apart from its express limitation.

In *Gordon v. City of Belle Glade*[43] plaintiff brought action against the city for damages for assault and battery and for false arrest and imprisonment. He alleged that he was negligently beaten by two city policemen while being arrested without a warrant for an alleged act that was not committed in the presence of the officers. Although the complaint was dismissed on the grounds that the plaintiff failed to bring the action within the statutory period,[44] the court discussed at length the *Hargrove* case and its implications. The court acknowledged that if the dissents from *City of Miami v. Bethel*[45] had been adopted by the *Hargrove* court, the *Hargrove* case would control these facts, since the acts of the policemen in this case are similar to those in *Bethel.* The court reasoned, however, that because the Supreme Court in *Hargrove* referred to the dissents and yet did not overrule the case, the dissents would not be controlling. The court said that this case falls within the exception to the *Hargrove* rule, as did *Bethel.* The court in *Hargrove* expressly suggested that "reference might properly be had to those [dissenting] opinions for a more thorough and lucid explanation of our justification for departure from the rule of municipal immunity."[46] It is

42. 71 HARV. L. REV. 744, 746 (1958).
43. 132 So. 2d 449 (2d D.C.A. Fla. 1961).
44. FLA. STAT. §95.241 (1961).
45. 65 So. 2d 34 (Fla. 1953) (dissenting opinion).
46. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 134 (Fla. 1957).

a reasonable inference from this statement that the *Hargrove* court intended to impose liability in this type of situation by abolishing municipal immunity. From the court's analysis in *Gordon* it appears that had the court reached the question, liability would have been denied.

In the action brought in *McCann v. City of Lake Wales*,[47] for injuries allegedly resulting from the negligence of a municipal employee, the plaintiff contended that prior decisions sustaining the validity of statutes requiring written notice of tort claims against municipalities as a condition precedent to suit, are no longer binding as precedents in view of the *Hargrove* decision. The court upheld the statute, declaring that the procedural requirement of notice is valid because the *Hargrove* case did not destroy *in toto* the differences between private and municipal corporations.[48]

Steinhardt v. Town of North Bay Village[49] has placed the greatest restriction upon the effect of the *Hargrove* decision. Damages from the city were claimed by landowners on the grounds that the municipal firemen had not been properly trained and that the fire truck had not been properly equipped with water. The fire truck did not contain the proper amount of water because the municipal employees had previously used the water to water the lawns, and then had forgotten to replenish the supply on the fire truck. The firemen did not know the location of the nearest fire hydrant nor how to hook up the fire hoses. The firemen called the Miami Beach Fire Department for assistance and instructions in hooking up the equipment, but during the forty minutes it took for aid to arrive, the plaintiffs' building burned down. The plaintiffs contended they had suffered a direct, personal injury proximately caused by the negligence of a municipal employee while acting within the scope of his employment, and that this case falls within the *Hargrove* rule of liability. Although recognizing that *Hargrove* rejected the rule of municipal liability for some torts arising out of governmental functions, the court ruled that here, just as in the *Elrod* case, the municipal officials were performing functions that required the exercise of legislative or quasi-legislative powers; the consequences of the acts, even if performed improperly, are not subject to civil liability.[50]

> If we look for *reasons* rather than reasoning in the cases denying municipal liability for loss occasioned by the failure to extinguish fires, we will find reasons enough. The most influential of these is the thought that a conflagration might cause losses, the

47. 144 So. 2d 505 (Fla. 1962).
48. *Id.* at 506.
49. 132 So. 2d 764 (3d D.C.A. Fla. 1961), *petition for cert. dismissed*, 141 So. 2d 737 (Fla. 1962).
50. 132 So. 2d at 767.

> payment of which would bankrupt the community. Closely allied with this fear is the realization that the crushing burden of extensive losses can better be distributed through the medium of private insurance.

It is extremely difficult to distinguish the negligence of the city in this situation from that alleged in the *Hargrove* case resulting from leaving the municipal jail unattended and the prisoner unprotected; this seems to be precisely the type of situation in which the court in *Hargrove* intended to impose liability upon the municipality.[51]

Future Import of the Hargrove Decision

Although, as a result of the constructions of the *Hargrove* doctrine by the district courts of appeal, the law of tort liability of Florida municipalities is still marked by confusion and inconsistency, an overall trend is apparent. That trend is toward the destruction of the barrier of sovereign immunity, stripping the municipalities of their special status and placing them in the same position as conventional employers. The time is near at hand when the rules of vicarious liability will be as applicable to municipalities as to any other employer. The law of liability of private corporations is tending to move away from a fault basis and toward the principle that the enterprise itself should bear the losses it causes; the law with respect to liability of public enterprises may move perhaps even further in the same direction. A governmental unit is supported by taxation and is not dependent upon private investment or profit. Thus, a large governmental unit is the best of all possible loss-spreaders, particularly if its taxes are geared to ability to pay. The ultimate principle may be that the taxpaying public should bear the losses that result from governmental activity.[52]

Judging from the language in the *Hargrove* opinion, this expansion of municipal tort liability will be effected by Florida Supreme Court decisions which will defeat the lower courts' efforts to continue the protection afforded the municipality by a rule of immunity from tort liability. The expanded tort liability will give rise to urgent new problems.

One problem is the peculiar situation of the small, Southern municipality, and the attitude of its citizens. The local government exists primarily for regulation, and not as a convenient organization to perform

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51. However, on petition for writ of certiorari in Steinhardt v. Town of North Bay Village, 141 So. 2d 737 (1962), the supreme court held the petition was without merit. Justice Drew dissented, saying that there was conflict bewteen the district court of appeal's decision and the *Hargrove* case.

52. Davis, *Tort Liability of Governmental Units*, 40 Minn. L. Rev. 751, 811 (1956).

business services for the people. It is more than a matter of the tax base; it is a matter of a philosophy of the government's place and responsibility.[53] Moreover, the citizens often consider themselves as one and the same with the community, and discourage suits against the municipal government.

In addition, solutions are needed for a number of practical problems, not previously encountered under the rule of municipal immunity, that are inherent in the mechanics of a rule of liability: How are the claims against the municipality to be handled? How is the municipality to meet its obligations? What is the best way to protect officers and employees from liability in carrying out their governmental duties? Can one system of responsibility be established that will be applicable to all divisions of the governmental unit?[54] The imposition of municipal liability requires establishment of appropriate administrative facilities to effectively handle liability claims.

Perhaps the most significant of all the problems to be faced is the question of what limits should be placed upon the liability of the formerly immune municipality. The need for limits on liability for negligence or fault in some kinds of governmental activity has always been recognized:[55]

> There are certain public services which only the government can adequately perform, as for example, the administration of justice, the preservation of public peace and enforcement of the laws, and the protection of the community from fire and disease. It may hence be conceded that the principle of immunity for the torts of officers engaged in "governmental" functions had some legitimate field of application.

This proposition may explain why legislators and judges have so long resisted the commentators' plea for the abolition of sovereign immunity.[56]

Vigorous judicial activity in this area of municipal liability creates serious problems demanding legislative action. Although the courts can establish a rule of liability for the torts of municipal employees, in the final analysis the ultimate burden rests on the legislature to determine the extent of the liability and to provide the machinery for compensation of the losses resulting from governmental activity. The demand of the legal commentators for judicial action on this question may soon be met

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53. David, *Public Tort Liability Administration: Basic Conflicts and Problems*, 9 LAW & CONTEMP. PROB. 335, 340 (1942).

54. 60 MICH. L. REV. 379, 381 (1962).

55. Borchard, *Government Liability in Tort*, 34 YALE L.J. 229, 240 (1925).

56. Davis, *supra* note 52, at 792.